

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LESLIE J. GAINES,

Plaintiff,

v.

A. HEDGEPEETH, et al.,

Defendants.

No. C 11-2124 JSW (PR)

ORDER OF SERVICE

INTRODUCTION

Plaintiff, a California prisoner proceeding pro se, filed this rights action pursuant to 42 U.S.C. § 1983. The complaint was dismissed with leave to amend, and plaintiff filed an amended complaint. The Court now reviews the amended complaint and orders it served upon certain Defendants.

DISCUSSION

I. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” “Specific facts are not

1 necessary; the statement need only "'give the defendant fair notice of what the . . . claim
2 is and the grounds upon which it rests.'" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200
3 (2007) (citations omitted). Although in order to state a claim a complaint "does not need
4 detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds of his
5 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic
6 recitation of the elements of a cause of action will not do. . . . Factual allegations must
7 be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v.*
8 *Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer
9 "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974. Pro se
10 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,
11 699 (9th Cir. 1990).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:

13 (1) that a right secured by the Constitution or laws of the United States was violated, and
14 (2) that the alleged violation was committed by a person acting under the color of state
15 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

16 II. Legal Claims

17 In his original complaint, Plaintiff claimed that he received inadequate dental care
18 at Salinas Valley State Prison, where he has been housed since 2007, and that one dentist
19 made an unwanted sexual advance towards him. The complaint was dismissed because it
20 failed to allege what role any of the defendants played in the alleged violation of
21 Plaintiff's rights. *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (at
22 pleading stage, "[a] plaintiff must allege facts, not simply conclusions, that show that an
23 individual was personally involved in the deprivation of his civil rights"). He was given
24 leave to amend to cure this deficiency.

25 Plaintiff's amended complaint has nine named defendants and two unnamed
26 defendants. He makes no allegations about defendants Adamo, Dr. Scanlon, Dr. Mack,
27 or Dr. Callinan, or how they were involved in or caused the alleged violation of his
28 rights. This is the same problem that the original complaint suffered from, and Plaintiff

1 was advised that his failure to cure this deficiency would result in the dismissal of his
2 claims. Consequently, the claims against defendants Adamo, Scanlon, Mack and
3 Callinan will be dismissed.

4 Plaintiff alleges that defendant Dr. Lee denied requests for dental care that
5 Plaintiff made in administrative appeals, even though Plaintiff told him that he could not
6 chew his food. Plaintiff also alleges that defendants Dr. Kumar, a dentist, and K. Blue, a
7 dental assistant, failed to provide adequate dental care to Plaintiff at California State
8 Prison, Lancaster, where Plaintiff was housed prior to his transfer to SVSP in December
9 2007. When liberally construed, plaintiff's allegations against these defendants state a
10 cognizable claim for the violation of his Eighth Amendment right to be free from cruel
11 and unusual punishment.

12 Plaintiff alleges that defendant Hedgepeth, the SVSP Warden, failed to properly
13 supervise and monitor the SVSP dental staff, and failed to implement adequate policies
14 regarding dental care, which led to Plaintiff's receiving inadequate care. When liberally
15 construed, this claim is cognizable.

16 Plaintiff alleges that defendants Blue and White verbally harassed him, which is
17 not a cognizable claim under Section 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738
18 (9th Cir. 1997). Consequently, this claim will be dismissed. Plaintiff also includes
19 allegations that a Dr. Newton made an unwanted sexual advance toward him. Plaintiff
20 does not name Dr. Newton as a defendant, however, nor does he state where or when this
21 occurred.

22 CONCLUSION

23 1. The claims against defendants Adamo, Mack, Scanlon, Callinan, and White are
24 DISMISSED.

25 2. The Clerk of the Court shall issue summons and the United States Marshal
26 shall serve, without prepayment of fees, a copy of the Amended complaint and all
27 attachments thereto, and a copy of this order upon Defendants: **Warden Anthony**
28 **Hedgepeth and Dr. Charles Dudley Lee at Salinas Valley State Prison; and upon Dr.**

1 **V. Kumar and K. Blue at California State Prison, Lancaster.**

2 The Clerk shall also mail a courtesy copy of the complaint and this order to the
3 California Attorney General's Office.

4 The Clerk shall also serve a copy of this order on Plaintiff.

5 3. In order to expedite the resolution of this case, the Court orders as follows:

6 a. No later than **ninety (90) days** from the date this order is filed,
7 Defendants shall either file a motion for summary judgment or other dispositive motion,
8 or a notice to the Court that they are of the opinion that this matter cannot be resolved by
9 dispositive motion. The motion shall be supported by adequate factual documentation
10 and shall conform in all respects to Federal Rule of Civil Procedure 56.

11 **Defendants are advised that summary judgment cannot be granted, nor**
12 **qualified immunity found, if material facts are in dispute. If defendants are of the**
13 **opinion that this case cannot be resolved by summary judgment, they shall so**
14 **inform the Court prior to the date the summary judgment motion is due.**

15 All papers filed with the Court shall be promptly served on the Plaintiff.

16 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with
17 the court and served upon defendants no later than thirty days from the date of service of
18 the motion. Plaintiff must read the attached page headed "NOTICE -- WARNING,"
19 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.
20 1998) (en banc), and *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

21 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed
22 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
23 plaintiff should take note of the attached page headed "NOTICE -- WARNING
24 (EXHAUSTION)." See *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003)

25 c. Defendants shall file a reply brief no later than **fifteen (15) days** after
26 Plaintiff's opposition is filed.

27 d. The motion shall be deemed submitted as of the date the reply brief is
28 due. No hearing will be held on the motion unless the Court so orders at a later date.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

LESLIE J. GAINES JR.,

Plaintiff,

v.

HEDGPETH et al,

Defendant.

Case Number: CV11-02124 JSW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 8, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Leslie J. Gaines
T42948
P.O. Box 1050
Soledad, CA 93960

Dated: September 8, 2011



Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk